U.S. Const. amend. 4 Search and seizure—Legitimate expectation of privacy.

us.a4.ss.xp.030 When a person sends a letter through the mail, that person has a reasonable expectation of privacy for that letter until the addressee actually receives the letter.

State v. Martinez, 221 Ariz. 383, 212 P.3d 75, ¶¶ 17–25 (Ct. App. 2009) (while in jail, defendant sent letter to his girlfriend, who was staying with her mother; mother intercepted letter before girlfriend received it, opened it, made copy, and gave copy to her attorney, who gave copy to state; court held that, because girlfriend had not yet received letter when mother opened it, defendant had standing to challenge search and seizure of letter).

U.S. Const. amend. 4 Search and seizure—Reasonableness.

us.a4.ss.r.010 The Fourth Amendment requires that all searches and seizures be reasonable.

State v. Childress, 222 Ariz. 334, 214 P.3d 422, ¶ 10 (Ct. App. 2009) (officer saw person on motorcycle (Petrillo) talking to driver of truck (defendant) at stoplight; when light changed, Petrillo pull two "wheelies," so officer initiated traffic stop; Petrillo turned into parking lot and defendant kept going, but as officer approached Petrillo, defendant drove into lot and stopped behind them; because officer was concerned for his safety, he told defendant to move in front of him if he wished to remain in lot; officer later approached defendant in truck, and smelled odor of alcohol, which ultimately led to defendant's arrest for DUI; court concluded officer's conduct was reasonable, thus no Fourth Amendment violation).

U.S. Const. amend. 4 Search and seizure—Persons subject to the exclusionary rule.

us.a4.ss.ps.010 The exclusionary rule applies when there is state action, and thus applies only if the person is employed by the state, is an agent for the state, or is the agent of one employed by the state.

State v. Martinez, 221 Ariz. 383, 212 P.3d 75, ¶¶ 30–31 (Ct. App. 2009) (while in jail, defendant sent letter to his girlfriend, who was staying with her mother; mother intercepted letter before girlfriend received it, opened it, made copy, and gave copy to her attorney, who gave copy to state; court held that mother was not acting as state agent).

us.a4.ss.ps.020 In determining whether a private party is acting as an agent of the state, the court will consider **two** factors, the first **of which is the state's knowledge of and acquiescence in** the private party's actions.

State v. Martinez, 221 Ariz. 383, 212 P.3d 75, ¶¶ 31–33 (Ct. App. 2009) (while defendant was in jail, his girlfriend was staying with her mother; prosecutor told mother that her daughter might commit perjury for defendant; mother said she would "look through" letters from defendant to see if he was directing daughter what to say, and said she would "turn them in" to prosecutor; prosecutor said "fine"; court held that, although prosecutor knew mother was going to search for and seize letters, prosecutor's reply of "fine" did not directly involve state in mother's activities).

us.a4.ss.ps.030 In determining whether a private party is acting as an agent of the state, the court will consider **two** factors, the **second** of which is the private party's intent in performing the search.

State v. Martinez, 221 Ariz. 383, 212 P.3d 75, ¶¶ 31–34 (Ct. App. 2009) (while defendant was in jail, his girlfriend was staying with her mother; prosecutor told mother that her daughter might commit perjury for defendant; mother said she would "look through" letters from defendant to see if he was directing daughter what to say, and said she would "turn them in" to prosecutor; prosecutor said "fine"; court held that, even if prosecutor's reply of "fine" indirectly encouraged mother to seize letters or manifested state's knowledge of and acquiescence in mother's actions, mother's intent in seizing letters was to protect her daughter from criminal charges and not to assist state in prosecuting defendant, thus mother was not acting as agent of state).

U.S. Const. amend. 4 Search and seizure—Investigative stop.

us.a4.ss.is.010 A detention or seizure occurs when a police officer restrains a citizen's liberty by means of physical force or show of authority, which includes the threatening presence of several officers, the display of weapons, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled, and in the absence of physical force, a seizure requires submission to a show of authority.

State v. Canales, 222 Ariz. 493, 217 P.3d 836, ¶¶ 2–8 (Ct. App. 2009) (officer was dispatched to apartment complex to investigate suspicious vehicle in parking lot; officer parked directly behind vehicle matching description of vehicle reported, shined lights inside of suspect vehicle, and approached driver's side window on foot; court concluded officer's actions conveyed to defendant that he was subject of inquiry and made it physically impossible for defendant to terminate encounter by leaving vehicle, thus defendant was detained).

State v. Childress, 222 Ariz. 334, 214 P.3d 422, ¶¶ 8–13 (Ct. App. 2009) (officer saw person on motorcycle (Petrillo) talking to driver of truck (defendant) at stoplight; when light changed, Petrillo pull two "wheelies," so officer initiated traffic stop; Petrillo turned into parking lot and defendant kept going, but as officer approached Petrillo, defendant drove into lot and stopped behind them; because officer was concerned for his safety, he told defendant to move in front of him if he wished to remain in lot; court concluded that officer's conduct was show of authority that resulted in non-consensual stop).

us.a4.ss.is.020 An officer may stop and detain a person for investigatory purposes if the totality of the circumstances gives the officer a reasonable, articulable suspicion that a particular person has committed, was committing, or was about to commit a crime.

State v. Diaz, 222 Ariz. 188, 213 P.3d 337, ¶¶ 3–6 (Ct. App. 2009) (court held following information gave officers probable cause to arrest defendant: Officers received tip that defendant would be purchasing methamphetamine in Tucson and returning to Sierra Vista in either blue Cadillac or red Buick accompanied by woman who would be concealing drugs in her vagina; within time frame of tip, officers stopped blue Cadillac for traffic violation, and defendant was passenger in vehicle; while officers were questioning driver, defendant acted nervously; narcotics dog alerted on vehicle, including where defendant was sitting; and driver admitted she had methamphetamine in her vagina; court stated this was sufficient to arrest defendant as principal, but that officers also could have arrested him as driver's accomplice).

us.a4.ss.is.040 If the totality of the circumstances do not give rise to a particularized and founded suspicion that the person is engaged in criminal activity, an officer may not stop and detain a person for investigatory purposes.

State v. Canales, 222 Ariz. 493, 217 P.3d 836, ¶¶ 9–17 (Ct. App. 2009) (officer was dispatched to apartment complex to investigate suspicious vehicle in parking lot; officer parked directly behind vehicle matching description of vehicle reported, shined lights inside of suspect vehicle, and approached driver's side window on foot; court concluded officer's actions conveyed to defendant that he was subject of inquiry and made it physically impossible for defendant to terminate encounter by leaving vehicle, and thus concluded defendant was detained; court further concluded that, because tip only described suspicious vehicle and contained no information that anyone was engaged in criminal activity, there was no reasonable suspicion that would justify detention; court noted that, once officer came into contact with defendant, he obtained information indicating that defendant had committed DUI, but because officer obtained this information only after he "detained" defendant, it could not be legal basis for detention).

us.a4.ss.is.080 If an officer has the right to stop and detain a person for investigation and has an articulable and objectively reasonable belief that the person poses a danger to the officer or others, the officer may search for weapons, the scope of which is limited to that necessary to protect the officer and the others.

State v. Johnson, 220 Ariz. 551, 207 P.3d 804, ¶¶ 6–10 (Ct. App. 2009) (officers conducted valid traffic stop, wherein defendant was passenger; officer asked defendant to exit vehicle in order to gain information about gang activity in area; once defendant exited vehicle, officer patted down defendant and found gun on him; because stop occurred in area associated with Crips gang, defendant was wearing blue, which is the Crips color, defendant was from Eloy, where Crips gang was active, it was reasonable for officer to suspect defendant was gang member, and officer knew gang members often carry guns; additionally, defendant told officer he been to prison and had been released about a year ago, and was carrying a police scanner; court held that, based on all factors then known to officer, it was reasonable for officer to conduct pat-down search).

us.a4.ss.is.090 An officer may conduct a protective stop or seizure of a third person on officer safety grounds when justified by a reasonable, articulable suspicion that the third person poses a danger to those on the arrest scene.

State v. Childress, 222 Ariz. 334, 214 P.3d 422, ¶¶ 14–18 (Ct. App. 2009) (officer saw person on motorcycle (Petrillo) talking to driver of truck (defendant) at stoplight; when light changed, Petrillo pull two "wheelies," so officer initiated traffic stop; Petrillo turned into parking lot and defendant kept going, but as officer approached Petrillo, defendant drove into lot and stopped behind them; because officer was concerned for his safety, he told defendant to move in front of him if he wished to remain in lot; court concluded that officer had reasonable, articulable suspicion that defendant posed potential danger to him, so order to move was reasonable).

U.S. Const. amend. 4 Search and seizure—Property subject to search and seizure.

us.a4.ss.pss.010 In order for a search or seizure warrant to be valid, the court must have in rem jurisdiction over the property, which means the property must be located within the court's jurisdiction.

State v. Western Union Fin. Serv., 220 Ariz. 567, 208 P.3d 218, ¶¶ 12–36, 43 (2009) (although Western Union did business in Arizona, court concluded Western Union money transfers sent from other states to Mexico were not located in Arizona, thus trial court did not have jurisdiction to issue warrant authorizing seizure of those money transfers).

U.S. Const. amend. 4 Search and seizure—Automobile stop.

us.a4.ss.astp.010 In order for an officer to stop an automobile for a traffic violation, the officer need have only reasonable suspicion that the driver has violated a traffic law.

State v. Starr, 222 Ariz. 65, 213 P.3d 214, ¶¶ 9–12 (Ct. App. 2009) (officer stopped defendant for making lane change without making proper signal, and subsequent search of vehicle disclosed marijuana, dangerous drugs, and drug paraphernalia; court concluded officer had reasonable suspicion that defendant had violated law requiring signaling prior to making lane change; court rejected defendant's contention that, for traffic stop, officer was required to have probable cause to believe driver had committed traffic offense).

U.S. Const. amend. 4 Search and seizure—Consent.

us.a4.ss.cs.010 An officer may search without a warrant if the suspect voluntarily consents, which will be determined by considering the totality of the circumstances.

State v. Caraveo, 222 Ariz. 228, 213 P.3d 377, ¶¶ 1–24 (Ct. App. 2009) (officers saw defendant park car on sidewalk and exit vehicle, they approached him and upon searching him found .380 handgun, jiggle key, and methamphetamine; trial court found that defendant's contact with officers was consensual, but held that officers were not permitted to conduct pat-down search unless they had articulable suspicion of criminal activity, which they did not, and so trial court granted defendant's motion to suppress; court noted that while this appeal was pending, United States Supreme Court held that, once officers have lawfully stopped person, they may conduct pat-down search if they have reason to believe person is armed and dangerous, and they do not need to have any belief about other criminal activity; state argued that defendant had consented to pat-down search, which trial court never decided one way or other; court held that, if defendant consented to pat-down search, it would be lawful search, and so remanded for trial court to determine whether defendant consented to pat-down search).

us.a4.ss.cs.150 If the police have engaged in illegal conduct and the defendant subsequently consents to a search, the court must look at three factors to determine whether the taint of the illegal conduct is sufficiently attenuated from the evidence subsequently obtained: (1) the time elapsed between the illegal conduct and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

State v. Guillen, 2010 WL 132543, ¶¶ 13–23 (Jan. 15, 2010) (officers received information that defendant was storing marijuana in his garage; when defendant and his wife were not home, officers brought narcotics dog to sniff outside of garage, whereupon dog alerted on garage; when defendant's wife returned, officers asked if they could search premises, and she consented; after narcotics dog alerted on freezer, officers obtained search warrant and discovered bales of marijuana in two other freezers; court began by assuming, without deciding, that dog sniff violated Article 2, Section 8; court then held that intervening circumstances obviated any alleged taint, specifically because wife was unaware of dog sniff when she consented, and that first dog sniff conducted from outside garage was not flagrant police conduct, thus trial court did not err in denying motion to suppress marijuana).

U.S. Const. amend. 4 Search and seizure—Probable cause—drawing blood.

us.a4.ss.pc.db.020 The fundamental question for blood draws and the Fourth Amendment is not whether the blood draw program as a whole is reasonable, but rather whether the means and procedure used in taking the defendant's blood was reasonable.

State v. Noceo, 223 Ariz. 222, 221 P.3d 1036, ¶¶ 6–12 (Ct. App. 2009) (court held trial court erred by evaluating entire DPS phlebotomy program instead of defendant's particular blood draw; furthermore, court concluded there were no overall defects in DPS phlebotomy program).

U.S. Const. amend. 5 Double jeopardy.

us.a5.dj.040 The guarantee against double jeopardy protects against a second prosecution for the same offense after conviction or acquittal, even when the acquittal was erroneous.

State v. Muscrove, 223 Ariz. 164, 221 P.3d 43, ¶¶ 10–14 (Ct. App. 2009) (court stated double jeopardy violations are fundamental error; court held that, once trial court granted defendant's motion for judgment of acquittal, that resolved charge in defendant's favor, and for trial court to reconsider its decision and send that count to jurors placed defendant in double jeopardy).

us.a5.dj.050 A retrial following a hung jury is a continuation of a single prosecution and does not present the problem of a conviction based upon conduct for which the defendant has been acquitted as part of the first trial.

State v. Huffman, 222 Ariz. 416, 215 P.3d 390, ¶¶ 5–7 (Ct. App. 2009) (court held that prohibition against double jeopardy did not bar subsequent retrial even though this was third trial after first two trials ended in hung juries).

us.a5.dj.170 Double jeopardy involves a fundamental right, thus a defendant does not waive a claim of double jeopardy by failing to raise it with the trial court.

State v. Muscrove, 223 Ariz. 164, 221 P.3d 43, ¶¶ 10–14 (Ct. App. 2009) (court stated double jeopardy violations are fundamental error; court held that, once trial court granted defendant's motion for judgment of acquittal, that resolved charge in defendant's favor, and for trial court to reconsider its decision and send that count to jurors placed defendant in double jeopardy).

U.S. Const. amend. 5 Double jeopardy—Elements.

us.a5.dj.elmnt.010 In determining whether offenses are the "same" for purposes of double jeopardy, the court looks at the elements of the offenses and not to the particular facts that will be used to prove them.

State v. Larson, 222 Ariz. 341, 214 P.3d 429, ¶ 7 (Ct. App. 2009) (court noted that court had rejected charging document test to determine whether two offenses are same for determining whether double jeopardy attached).

U.S. Const. amend. 5 Self-incrimination—State action.

us.a5.si.sa.020 Members of the U.S. Army Criminal Investigation Division are considered law enforcement officials for purpose of determining state action.

State v. Lucero, 223 Ariz. 129, 220 P.3d 249, ¶¶ 11–15 (Ct. App. 2009) (court held trial court should have found as matter of law that special agent from Criminal Investigation Division was law enforcement officer and thus erred in instructing jurors that they had to determine as factual matter whether special agent was law enforcement officer).

U.S. Const. amend. 5 Self-incrimination—Voluntariness.

us.a5.si.vol.020 In determining whether a confession is voluntary, the appellate court will defer to the trial court's determination of witness credibility.

State v. Lucero, 223 Ariz. 129, 220 P.3d 249, ¶¶ 8–10 (Ct. App. 2009) (at voluntariness hearing, defendant and state presented conflicting evidence whether defendant's incriminating statements were result of threats, coercion, or promises of leniency; trial court assessed credibility of witnesses, weighed conflicting evidence, and determined testimony of special agent was credible; court found no error because credibility was issue left to trier of fact and there was evidence supporting trial court's findings that defendant's statements to special agent were procured without promises or threats and that special agent did nothing to coerce defendant to make those statements).

us.a5.si.vol.130 If the defendant has some emotional, mental, or physical defect or deficiency, that will not make a confession involuntary unless the officers know about the defect or deficiency and exploit that defect or deficiency. (*Colorado v. Connelly,* 479 U.S. 157 (1986).)

State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069, ¶¶ 12–15 (Ct. App. 2009) (defendant contended his waiver of rights was neither knowing nor voluntary because he was under influence of drugs; court noted there was no evidence police exploited defendant's condition, thus police did not engage in any improper conduct, so trial court did not abuse discretion in denying defendant's motion to suppress).

U.S. Const. amend. 5 Self-incrimination—*Miranda.*

us.a5.si.mir.210 When a person is subjected to custodial interrogation without being given *Miranda* warnings (*Mws*) and makes an incriminating statement, and then the officers give the *Mws* and the person makes a further incriminating statement, whether the post-*Mw* statement will be admissible depends on whether the officers deliberately withheld the *Mws*; if the officers **did not** deliberately withhold the *Mws* and the pre-*Mw* statement was not coerced or involuntary, the post-*Mw* statement is admissible; if the pre-*Mw* statement was coerced or involuntary, the post-*Mw* statement is admissible only if taint dissipated through the passing of time or a change in circumstances.

State v. Zamora, 220 Ariz. 63, 202 P.3d 528, ¶¶ 11–15 (Ct. App. 2009) (officers found defendant in vacant apartment; officer A questioned defendant for 5 to 15 minutes, arrested him, and took him to police car; officer H then read *Miranda* warnings (*Mws*); when officer A returned to police car, officer A told defendant that he would have to re-tell his story now that he had received *Mws*; record is unclear what defendant said after receiving *Mws*; court remanded because it could not tell from record whether trial court applied right standard to determine whether defendant was in custody prior to receiving *Mws*, and if pre-*Mw* statements were not admissible, what was relationship between pre- and post-*Mw* statements).

us.a5.si.mir.220 When a person is subjected to custodial interrogation without being given *Miranda* warnings (*Mws*) and makes an incriminating statement, and then the officers give the *Mws* and the person makes a further incriminating statement, whether the post-*Mw* statement will be admissible depends on whether the officers deliberately withheld the *Mws*; if the officers **did** deliberately withhold the *Mws,* the post-*Mw* statement will be admissible only if the *Mws* were effective based on both objective and curative factors, which include: (1) the completeness and detail of the pre-warning interrogation; (2) the overlapping content of the two rounds of interrogation; (3) the timing and circumstances of both interrogations; (4) the continuity of police personnel; (5) the extent to which the interrogator's questions treated the second round of interrogation as continuous with the first; and (6) whether any curative measures were taken.

State v. Zamora, 220 Ariz. 63, 202 P.3d 528, ¶¶ 11–17 (Ct. App. 2009) (officers found defendant in vacant apartment; officer A questioned defendant for 5 to 15 minutes, arrested him, and took him to police car; officer H then read *Miranda* warnings (*Mws*); when officer A returned to police car, officer A told defendant that he would have to re-tell his story now that he had received *Mws*; record is unclear what defendant said after receiving *Mws*; court remanded because it could not tell from record whether trial court applied right standard to determine whether defendant was in custody prior to receiving *Mws*, and if pre-*Mw* statements were not admissible, what was relationship between pre- and post-*Mw* statements).

U.S. Const. amend. 5 Self-incrimination—*Miranda*—Waiver.

us.a5.si.mir.wav.120 If a person is in custody, has received the *Miranda* warnings, and is subject to custodial interrogation, if the person makes an ambiguous request for the **presence of an attorney,** the police may continue interrogating the person.

State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069, ¶¶ 5–11 (Ct. App. 2009) (during interview, defendant told detectives, "[I t]hink I need a lawyer," and when they did not respond, asked them, "Do I need a lawyer"; court concluded this was not unambiguous request for counsel, thus trial court did not abuse discretion in finding defendant had not invoked right to counsel).

U.S. Const. amend. 6 Notice of charges.

us.a6.nt.010 The Sixth Amendment grants a defendant the right to notice of the nature and cause of the accusations and a copy of the charging document.

State v. Freeney, 223 Ariz. 110, 219 P.3d 1039, ¶¶ 26–30 (2009) (grand jury indicted defendant for aggravated assault based on § 13–1203(A)(2) (placing another in reasonable apprehension of imminent physical injury) with allegation of dangerousness, based in part on infliction of serious physical injury upon victim; on first day of trial, before jury selection, state moved to amend indictment to change theory of assault from § 13–1203(A)(2) to § 13–1203(A)(1) (causing physical injury to another); court held that amendment changed nature of offense; court stated that defendant may receive notice of charges from indictment or other sources, and here defendant had notice from (1) allegation of dangerousness, (2) police reports, medical reports, and photographs showing victim's injuries; and (3) joint pretrial statement).

us.a6.nt.020 The state may move to amend the charging document as long as the amendment does not change the nature of the offense or does not prejudice the defendant.

State v. Freeney, 223 Ariz. 110, 219 P.3d 1039, ¶¶ 29–30 (2009) (grand jury indicted defendant for aggravated assault based on § 13–1203(A)(2) (placing another in reasonable apprehension of imminent physical injury) with allegation of dangerousness, based in part on infliction of serious physical injury upon victim; on first day of trial, before jury selection, state moved to amend indictment to change theory of assault from § 13–1203(A)(2) to § 13–1203(A)(1) (causing physical injury to another); court held that amendment changed nature of offense, but that any error was harmless because (1) defendant knew from allegation of dangerousness that state was alleging infliction of serious physical injury upon victim and that he would have to defend against that allegation; (2) defendant had police reports, medical reports, and photographs showing victim's injuries; (3) joint pretrial statement said defendant hit victim in head and body with metal bar; (4) amendment was granted before jurors were selected and evidence presented; and (5) defendant's defense was all or nothing, that he was not the one who committed the offense).

U.S. Const. amend. 6 Right to be present at trial.

us.a6.pt.010 A defendant has a constitutionally guaranteed right to be present at any stage in the criminal proceeding that is critical to its outcome if the defendant's presence would contribute to the fairness of the procedure.

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 6–13 (Ct. App. 2009) (defendant appeared at sentencing by interactive audiovisual system; court held trial court erred in holding sentencing without defendant physically present; because defendant did not object, court reviewed for fundamental error, and because it found defendant failed to show prejudice, affirmed sentence).

us.a6.pt.050 A defendant may forfeit the right to attend judicial proceedings if, after being warned by the court, the defendant continues to behave in such a disorderly, disruptive, or disrespectful way that the proceedings cannot take place with the defendant present.

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 9–10 (Ct. App. 2009) (at sentencing, defendant appeared by interactive audiovisual system; court noted that, although defendant was disruptive at initial appearance, he was cooperative at violation hearing, thus his behavior at earlier hearing, standing alone, was not sufficient ground for excluding him from sentencing hearing).

U.S. Const. amend. 6 Trial by jury.

us.a6.jt.030 Under the Sixth Amendment, for a trial under state law, the defendant is not entitled to a 12-person jury.

State v. Escobedo, 222 Ariz. 252, 213 P.3d 689, ¶¶ 10, 19, 23 (Ct. App. 2009) (court reviewed United States Supreme Court case that held that trial by six-person jury did not violate Sixth Amendment as applied to States through Fourteenth Amendment), *aff'd,* 2010 WL 532342 (Ct. App. Feb. 16, 2010).

us.a6.jt.040 If the trial court states that it will not impose a sentence greater than 6 months, the defendant is not entitled to a jury trial.

State v. Soliz, 223 Ariz. 116, 219 P.3d 1045, ¶ 15 (2009) (court analyzed federal case law in support of its reasoning; in present case, defendant was charged with possession of dangerous drugs for sale; with allegation of prior convictions, defendant could have received maximum sentence of 35 years; trial court impaneled only eight-person jury and neither defendant nor state objected; after jurors convicted defendant, state declined to prove defendant's prior convictions or any aggravating circumstances; trial court imposed presumptive sentence of 10 years; court held that defendant's maximum sentence thereby was limited to less than 30 years, thus there was no error in impaneling eight person jury).

U.S. Const. amend. 6 Counsel—Statements.

us.a6.cs.stmt.010 The state violates a defendant's right to counsel when it deliberately elicits incriminating information from a charged defendant who is entitled to assistance of counsel.

State v. Martinez, 221 Ariz. 383, 212 P.3d 75, ¶¶ 11–16 (Ct. App. 2009) (although defendant's Sixth Amendment right to counsel had attached because state had filed interim complaint, defendant made his statements to fellow inmate, who court concluded under facts of case was not state agent).

us.a6.cs.stmt.020 Once the right to counsel has attached, the state violates a defendant's right to counsel only if the person obtaining the information is a state agent.

State v. Martinez, 221 Ariz. 383, 212 P.3d 75, ¶¶ 11–16 (Ct. App. 2009) (although defendant's Sixth Amendment right to counsel had attached because state had filed interim complaint, defendant made his statements to fellow inmate, who court concluded under facts of case was not state agent).

U.S. Const. amend. 6 Counsel—Pre-charging.

us.a6.cs.pcg.010 A defendant's right to counsel attaches with the commencement of the criminal proceedings.

State v. Martinez, 221 Ariz. 383, 212 P.3d 75, ¶ 11 (Ct. App. 2009) (defendant's Sixth Amendment right to counsel attached upon filing of interim complaint, which was day after defendant's arrest).

U.S. Const. amend. 6 Trial by jury—*Apprendi/Blakely* issues.

us.a6.jt.a/b.050 Under the United States Constitution, the defendant is not entitled to have the jurors determine the existence of a previous **felony** conviction, or any legal issue about that previous conviction.

State v. Johnson, 220 Ariz. 551, 207 P.3d 804, ¶ 17 (Ct. App. 2009) (trial court found defendant had two prior convictions).

us.a6.jt.a/b.130 If the trial court imposes a sentence within the prescribed statutory maximum, the trial court may rely on any aggravating circumstance if the effect of that aggravating circumstance is only to increase the minimum sentence.

Rogers v. Cota, 223 Ariz. 44, 219 P.3d 254, ¶¶ 12–13 (Ct. App. 2009) (because finding that defendant had BAC exceeding .20 only increased minimum jail term and fine, defendant was not entitled to have jurors determine whether BAC exceeded .20).

U.S. Const. amend. 14 Due process.

us.a14.dp.010 The United States Due Process Clause provides that a person will not be deprived of life, liberty, or property without due process of law.

State v. Schmidt, 220 Ariz. 563, 208 P.3d 214, ¶¶ 5–12 (2009) (court held that "catch all" aggravating factor is patently vague, and using that factor as sole factor to increase defendant's sentence violates due process because it gives trial court virtually unlimited post hoc discretion to determine whether defendant's prior conduct is functional equivalent of element of aggravated offense; because trial court increased length of defendant's sentence based solely on "catch all" aggravating factor, court held sentence was invalid).

U.S. Const. amend. 14 Due process—Vagueness.

us.a14.dp.vg.010 If a statute has terms that give a person of ordinary intelligence the opportunity to know what is prohibited and provides standards for those who apply the statute, the statute will not violate the Due Process Clause of the Fourteenth Amendment; perfect notice, absolute precision, or impossible standard are not required.

State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069, ¶¶ 34–36 (Ct. App. 2009) (court held that, because definition of "structure" includes vehicle, entry into vehicle with intent to commit theft

or felony therein constitutes burglary, and rejected defendant's argument that definition of phrase "enter or remain unlawfully," which contains only the word "premises" made burglary statute ambiguous; court similarly rejected defendant's vagueness argument).

U.S. Const. amend. 14 Due process—Burden of proof.

us.a14.dp.bp.050 A defendant is entitled to be acquitted if there is a reasonable doubt whether guilt is satisfactorily shown; even though jurors have the ability to return a verdict of not guilty even if the state has proved all elements of the offense beyond a reasonable doubt, a defendant has no right to a jury nullification instruction, which would tell them that they may find the defendant not guilty even if they find the state has proved its case beyond a reasonable doubt.

State v. Paredes-Solano, ___ Ariz. ___, 222 P.3d 900, ¶¶ 24–27 (Ct. App. 2009) (trial court correctly refused defendant's following proposed instruction: "You are . . . entitled to act upon your conscientious feeling about what is a fair result in this case and acquit the defendant if you believe strongly that conscience and justice require a verdict of not guilty. No one can require you to return a verdict that does violence to your conscience.").

U.S. Const. amend. 14 Due process—Guilty plea.

us.a14.dp.gp.010 Because a defendant waives several constitutional rights when pleading guilty, including the privilege against self-incrimination, the right to a jury trial, the right of proof beyond a reasonable doubt, and the opportunity to confront and cross-examine accusers, the trial court, to satisfy due process concerns, must ensure that the defendant understands the rights being waived and enters the plea agreement knowingly and voluntarily.

State v. Allen, 223 Ariz. 125, 220 P.3d 245, ¶¶ 13–14 (2009) (defendant was charged with possession of marijuana; trial court read to jurors stipulation between defendant and state that defendant was in possession of usable amount of marijuana; court held that, even if defendant stipulates to all elements of offense, that is not plea of guilty, and that unless defendant pleads guilty to offense, trial court does not have to go through guilty plea litany).

U.S. Const. amend. 14 Due process—Collection, retention, and disclosure of evidence.

us.a14.dp.ev.020 When the state has failed to preserve evidence the exculpatory nature of which is unknown, the defendant must show that the state acted in bad faith in order to show a due process violation.

State v. Speer, 221 Ariz. 449, 212 P.3d 787, ¶¶ 36–38 (2009) (MCSO kept digital tape recordings of jail telephone calls for 6 months, and then tapes are reused; officers obtained court order to listen to tapes of calls defendant made, and copied 27 of them; officers did not copy nine tapes, and those were recorded over after 6 months; defendant moved to suppress 27 tapes that were copied, which trial court denied; court held that defendant failed to establish either that destroyed tapes contained material exculpatory evidence or that police acted in bad faith, thus defendant failed to establish due process violation).

U.S. Const. amend. 14 Due process—Identification procedures.

us.a14.dp.id.010 In reviewing the trial court's ruling on whether an identification procedure was unnecessarily suggestive and whether the identification was otherwise reliable, the appellate court will look only at the evidence presented at the hearing on the motion to suppress, and not to evidence presented at trial.

State v. Moore, 222 Ariz. 1, 213 P.3d 150, ¶ 17 (2009) (court makes general statement).

us.a14.dp.id.050 To establish a due process violation, a defendant must establish three factors, the **third** of which is that the identification is not otherwise reliable, which will depend on (1) the witness's opportunity to view the person, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description, (4) the witness's level of certainty at the confrontation, and (5) the length of time between the crime and the confrontation.

State v. Moore, 222 Ariz. 1, 213 P.3d 150, ¶¶ 24–29 (2009) (court concluded (1) witness had adequate opportunity to view defendant, (2) witness paid attention to defendant when shootings began, (3) witness's descriptions of shooter coincided with defendant's appearance, (4) witness was certain person she identified in photo lineup shot her, (5) although witness's deposition took place nearly 6 months after shooting, passage of time did not defeat reliability; court concluded identification was permissible, and any defects went to weight and not admissibility).

us.a14.dp.id.070 While a suggestive pretrial procedure may taint an in-court identification, if the pretrial procedure satisfies due process, a subsequent in-court procedures will not violate a defendant's due process rights.

State v. Moore, 222 Ariz. 1, 213 P.3d 150, ¶¶ 30–32 (2009) (trial court found, and appellate court agreed, that identification was sufficiently reliable to be admissible; fact that witness was present in court when prosecutor made opening statement and talked about witness identifying defendant did not render inadmissible either the pretrial identification or the later in-court identification).

U.S. Const. amend. 14 Due process—Notice.

us.a14.dp.nt.010 Due process requires that the defendant be given notice of the specific charges, and a chance to be heard in a trial of the issues raised by that charge.

State v. Moore, 222 Ariz. 1, 213 P.3d 150, ¶¶ 51–56 (2009) (defendant was charged with one count of premeditated murder and two counts of premeditated and felony murder with underlying felony being burglary; defendant contended he was denied due process because state did not provide notice until after close of evidence and settling of jury instructions that it intended to establish burglary based on defendant's entry into house with intent to commit murder; court held that, because defendant knew he was charged with premeditated murder in house and burglary of house, he had sufficient notice for charge of felony murder).

State v. Fimbres, 222 Ariz. 293, 213 P.3d 1020, ¶¶ 26–43 (Ct. App. 2009) (defendant purchased merchandise using gift cards that had been altered so that information encoded on magnetic strips corresponded to various credit and debit cards belonging to persons other than defendant; defendant was charged with falsely using credit card under § 13–2104(A)(2); trial court instructed jurors not only for § 13–2104(A)(2), but also on altering credit card under § 13–2104(A)(1); although defendant did not raise this issue with trial court, he contended on appeal that trial court lacked subject matter jurisdiction to convict him under section (A)(1), and that this was fundamental error; court noted that defendant's defense at trial was that he did not have intent to defraud, and because intent to defraud was element of both section (A)(1) and (A)(2), instructing under (A)(1) did not take from defendant any right essential to his defense, thus defendant failed to prove any error was fundamental; court further noted that defendant did not request that trial court give jurors interrogatory requiring them to specify under which subsection they found him guilty, so defendant could not establish that jurors convicted him under section (A)(1), thus was unable to prove prejudice).

U.S. Const. amend. 14 Due process—Restraints.

us.a14.dp.rs.040 A brief and inadvertent exposure of a handcuffed or shackled defendant to the jurors is not so inherently prejudicial that the defendant is entitled to a new trial, instead he must show actual prejudice in order to obtain a new trial.

State v. Speer, 221 Ariz. 449, 212 P.3d 787, ¶¶ 69–76 (2009) (prosecutor inadvertently had contact with one of jurors; next day when trial court questioned juror, deputy brought defendant into courtroom in handcuffs; trial court immediately asked deputy to bring defendant back into courtroom later; when trial court questioned juror, she stated she already knew from trial evidence that defendant was in jail, thus seeing defendant in handcuffs would not affect her views; court concluded defendant failed to establish prejudice).

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